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DEPARTMENT OF STATE

22 CFR Parts 120, 125, 126, and 130

Public Notice: 9672

RIN: 1400-AD70

International Traffic in Arms: Revisions to Definition of Export and Related Definitions

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: On June 3, 2016, the Department of State published an interim final rule amending and adding definitions to the International Traffic in Arms Regulations (ITAR) as part of the President's Export Control Reform (ECR) initiative. After review of the public comments to the interim final rule, the Department further amends the ITAR by revising the definition of "retransfer" and making other clarifying revisions.

DATES: The rule is effective on [insert date of publication in the Federal Register].

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ITAR Amendment – Revisions to Definitions.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130). On June 3, 2015, the Department of State published a rule (80 FR 31525) proposing to amend the International Traffic in Arms Regulations (ITAR) by revising key definitions, creating several new definitions, and revising related provisions, as part of the President’s Export Control Reform (ECR) initiative. After review of the public comments on the proposed rule, the Department published an interim final rule (81 FR 35611, June 3, 2016) implementing several of the proposed revisions and additions, with an additional comment period until July 5, 2016. After reviewing the public comments to the interim final rule, the Department further amends the ITAR by revising the definition of “retransfer” in §120.51, adding a new paragraph (f) to §125.1, revising §126.16(a)(1)(iii) and §126.17(a)(1)(iii), revising §126.18(d)(1), and revising §130.2.

Changes in This Rule

The following changes are made to the ITAR with this final rule: (i)
revisions to the definition of “retransfer” in §120.51 to clarify that temporary

transfers to third parties and releases to same-country foreign persons are within the scope of the definitions; (ii) addition of a new paragraph (f) in §125.1 to mirror the new sections of the ITAR in §§ 123.28 and 124.1(e) detailing the scope of licenses; (iii) revising §126.16(a)(1)(iii) and §126.17(a)(1)(iii) to reflect the definitions of reexport and retransfer in the Defense Trade Cooperation Treaties with Australia and the United Kingdom, respectively, and to make appropriate revisions to the definitions of reexport in §120.19 and retransfer in §120.51 to reflect that these definitions do not apply in the treaty context; (iv) revisions to §126.18(d)(1) to clarify that the provisions include all foreign persons who meet the definition of regular employee in §120.39; and (v) revisions to §130.2 to ensure that the scope of the Part 130 requirements does not change due to the revised and new definitions. The remaining definitions published in the June 3, 2015 proposed rule (80 FR 31525) and not addressed in the June 3, 2016 interim final rule or this final rule, will be the subject of separate rulemakings and the public comments on those definitions will be addressed therein.

Response to Public Comments

One commenter stated that §120.17 (a)(1) is ambiguous and could lead to misinterpretation as to whether the transfer of a defense article to a

foreign person within the United States would be considered an export. The Department notes that a transfer of a defense article to a foreign person in the United States is not an export, unless it results in a release of technical data under §120.17(a)(2), is a defense article covered under §120.17(a)(3), or involves an embassy under §120.17 (a)(4). The Department confirms that simply allowing a foreign person in the United States to possess a defense article does not require authorization under the ITAR unless technical data is revealed to that person through the possession, including subsequent inspection, of the defense article, or that person is taking the defense article into an embassy.

One commenter stated that §120.17(a)(2) implies that only transfers to foreign persons that occur in the United States constitute an export and asked the Department to add “or abroad” to include transfers to foreign persons outside of the United States. The Department does not accept the comment. One of the improvements of the new definitions for export, reexport, and retransfer is that they more specifically delineate the activities described by each term. The Department confirms that the transfer of technical data to a foreign person is always a controlled activity that requires authorization from the Department. The shipment of technical data, in physical, electronic, verbal, or any other format, from the United States to a

foreign country is an export under §120.17(a)(1). The release of technical data to a foreign person in the United States is an export under §120.17(a)(2). The release of technical data to a foreign person in a foreign country is a retransfer under §120.51(a)(2), if the person is a national of that country, or a reexport under §120.19(a)(2), if the person is a dual or third country national (DN/TCN). The shipment of technical data, in physical, electronic, verbal, or any other format, from one foreign country to another foreign country is a reexport under §120.19(a)(1). Finally, the shipment of technical data, in physical, electronic, verbal, or any other format, within one foreign country is a retransfer under §120.51(a)(1).

One commenter asked why paragraph (b) in §§ 120.17 and 120.19 is not within paragraph (a)(2) of each definition, as that paragraph deals with releases of technical data. The Department did not include the text of paragraph (b) in §§ 120.17 and 120.19 as a note because it warrants being included in the ITAR as regulatory text. The Department notes that paragraph (b) applies to all of paragraph (a) and not just to paragraph (a)(2). The Department did not include paragraph (b) in §120.51 because a retransfer will only involve same country nationals. A release to a dual or third country national will be an export or reexport.

One commenter asked if theoretical or potential access to technical data is a release. The Department confirms that theoretical or potential access to technical data is not a release. As stated in the preamble to the interim final rule however, a release will have occurred if a foreign person does actually access technical data, and the person who provided the access is an exporter for the purposes of that release.

One commenter asked how extensively an exporter is required to inquire as to a foreign national's past citizenships or permanent residencies. The Department confirms that any release to a foreign person is a controlled event that requires authorization to all countries where that foreign person holds or has held citizenship or is a permanent resident. The Department also confirms that it will consider all circumstances surrounding any unauthorized release and will assess responsibility pursuant to its civil enforcement authority based on the relative culpability of all of the parties to the transaction.

One commenter asked if an exporter is required to inquire into citizenships a foreign national has renounced. The Department confirms that any release to a foreign person is a controlled event that requires authorization to all countries where that foreign person has held citizenship.

One commenter asked which citizenship controls (for purposes of DDTC authorizations) apply where a foreign national has multiple citizenships. The Department confirms that any release to a foreign person is a controlled event that requires authorization to all countries where that foreign person holds or has held citizenship or is a permanent resident, and that such authorization or authorizations must authorize all applicable destinations.

One commenter asked if DDTC considers an individual's country of birth sufficient to establish a particular nationality for that individual for ITAR purposes (i.e., will DDTC consider a person born in a particular country as a national of that country, even if the person does not hold citizenship or permanent residency status in his/her country of birth?). The Department confirms that in circumstances where birth does not confer citizenship in the country of birth, it does not confer citizenship or permanent residency in that country for purposes of the ITAR.

One commenter noted that the DDTC Agreement Guidelines refer to the country of origin or birth, in addition to citizenship, as a consideration when vetting DN/TCNs. The Department has updated the Agreement Guidelines consistent with the interim final rule.

Several commenters asked whether a temporary retransfer to a separate legal entity within the same country, such as for the purpose of testing or to subcontractors or intermediate consignees, is within the scope of §120.51. The Department confirms that such a temporary retransfer is a temporary change in end-user or end-use and is within the scope of §120.51. The Department revises §120.51 to clarify this point by adding “...or temporary transfer to a third party....”

Several commenters asked that the Department remove “letter of explanation” from §§ 123.28 and 124.1(e), stating that foreign parties do not have access to “letters of explanation” and other side documents which may have been submitted by the U.S. applicant, and which may impact the scope of the authorization. The Department does not accept the comments to the extent that they recommend a change to the regulatory text. However, the Department acknowledges the importance of the foreign parties being informed of the scope of the authorization relevant to their activities and will address the commenters’ concerns in the licensing process.

One commenter noted that, based upon the consolidation of §124.16 into §126.18, the reference to §124.16 under §126.18(a) is no longer accurate. The Department notes that amendatory instruction #16 in the interim final rule makes this amendment.

One commenter asked if use of the word reexport in new §126.18(d) means that only employees who have the same nationality as their employer can receive technical data directly from, or interact with, the U.S. exporter, with attendant responsibility on the employer who reexports such technical data to its DN/TCN. The Department confirms that, to the extent that a DN/TCN employee of an authorized end user, foreign signatory, or consignee acts as an authorized representative of that company, the provision of technical data by an authorized U.S. party to the foreign company through the DN/TCN employee is a reexport from the foreign company to the DN/TCN employee that may be authorized under §126.18.

One commenter noted that new §126.18(d)(4) will require individual DN/TCNs to sign a non-disclosure agreement (NDA) unless their employer is a signatory to a relevant agreement, meaning that authorized DN/TCNs will have to sign an NDA for access to articles covered by a license. The commenter further noted that the exemptions progressively introduced for DN/TCNs were motivated at least in part by concerns among U.S. allies about domestic anti-discrimination law. The Department does not accept this comment. All activities that could be authorized under §124.16 remain available under §126.18(d). If a foreign party is not able to utilize the

expansion of the authorization to non-agreement-related reexports due to its domestic law, the other provisions of §126.18 remain available.

One commenter asked whether the requirement of §126.18(d)(5) that authorized individuals are “[n]ot the recipient of any permanent transfer of hardware” is intended to limit authorized recipients of temporary hardware transfers or to require, in the case of reexports to an individual person, the separate authorization by name or controlling entity on the agreement. The Department intended that permanent retransfers of hardware not be authorized under §126.18(d). Eligible individuals may receive temporary hardware transfers or receive hardware on a temporary basis. If a permanent retransfer to an individual is intended, that person should be separately authorized by name or controlling entity on the agreement.

One commenter noted that in §§ 125.4(b)(9) and 126.18(d), the defined term regular employee is modified. Revised §125.4(b)(9)(iii) requires that an employee, including foreign person employees, be "directly employed by" a U.S. person. Revised §126.18(d)(1), refers to "bona fide regular employees directly employed by the foreign business entity" The commenter requested that the Department clarify the use of the term "regular employee" and state clearly if conditions apply beyond those stated in the definition of "regular employee" set forth in §120.39. The Department

accepts the comment in part. The Department also confirms that a regular employee is any party who meets the definition set forth in §120.39 and that §126.18(d) is updated to clarify that the control relates to regular employees as defined in §120.39. However, in §125.4(b)(9), the term “directly employed” is used to distinguish employees of a U.S. person from employees of related business entities, such as foreign subsidiaries. The Department confirms that all regular employees of the U.S. person, under §120.39, are included within the authorization, including an individual in a long-term contractual relationship hired through a staffing agency.

One commenter noted that §125.4(a) excludes use of the §125.4(b) exemptions for §126.1 countries and stated that it would be advantageous for the U.S. government if U.S. exporters could utilize §125.4(b)(9) in the context of U.S. persons or foreign person employees supporting the U.S. government in a §126.1 country. The Department does not accept the comment. Exports by private companies to §126.1 countries require individual authorizations, unless authorized under §126.4. Changes to §126.4 to account for transfers in support of U.S. government efforts will be addressed in a separate rulemaking.

One commenter noted that the revision to §125.4(b)(9) expands the scope of the provision to allow exports, reexports, and retransfers to and

between U.S. persons employed by different U.S. companies and the U.S. government. The commenter stated their opinion that this expansion is appropriate and desirable, as it benefits the U.S. government in practical situations. The Department accepts this comment and confirms that such exports, reexports, and retransfers may be authorized under the revised §125.4(b)(9), if all other terms and conditions are met.

One commenter asked the Department to clarify the impact of the new and revised definitions on the requirements under Part 130. The Department confirms that the changes to the ITAR in the interim final rule did not change the requirements under Part 130. The Department also revises §130.2 to clarify this understanding.

One commenter noted that the Department did not publish a final rule for activities that are not exports, reexports, or retransfers, and that the Bureau of Industry and Security (BIS) at the Department of Commerce did publish such a provision. The commenter asked the Department to clarify if any of the activities described by BIS as not being exports, reexports, or transfers under the Export Administration Regulations (EAR) would be exports, reexports, or retransfers under the ITAR. The Department confirms that it would not be appropriate to rely on provisions outside of the ITAR or guidance provided by any entity other than the Department for authoritative

interpretive guidance regarding the provisions or scope of the ITAR. The Department also notes that any activity meeting the definition of export, reexport, or retransfer requires authorization from the Department unless explicitly excluded by a provision of the ITAR, the Arms Export Control Act, or other provision of law.

One commenter asked if, as the Department did not publish a final rule defining “required” or “directly related,” exporters can rely on definitions in the EAR or guidance from the BIS on those two terms. The ITAR does not define “required” or “directly related.” The Department confirms that it would not be appropriate to rely on definitions outside of the ITAR or guidance provided by any entity other than the Department for authoritative interpretive guidance regarding the provisions or scope of the ITAR. Further questions regarding the application of the terms “required” or “directly related” should be referred to the Department for additional interpretive guidance.

Several commenters submitted comments regarding definitions and other provisions that were included in the proposed rule, but not published in the interim final rule. The Department did not accept comments on issues not addressed in the interim final rule and will address those definitions and

other provisions included in the proposed rule, but not published in the interim final rule, in a separate rulemaking.

Other Changes in This Rulemaking

In this final rule, the Department has also made changes to §§ 126.16 and 126.17 to ensure that they remain consistent with the definitions contained in the treaties (with Australia and the United Kingdom, respectively) that they implement. These treaties are controlling law, and the Department realized that, unless a correction were made in this final rule, the ITAR definitions of "reexport" and "retransfer" would be inconsistent with the treaty definitions. Therefore, for those two sections and the matters controlled therein, the treaty definitions will control. Conforming edits were also made to the definitions in §§ 120.19 and 120.51 to clarify that the definitions did not apply to matters covered by the treaties.

Regulatory Findings

Administrative Procedure Act.

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the U. S. government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this

rulemaking is exempt from the rulemaking provisions of the APA and without prejudice to its determination that controlling the import and export of defense articles and defense services is a foreign affairs function, the Department provided a 30-day public comment period and is responding to the comments received.

Regulatory Flexibility Act.

Since this rulemaking is exempt from the rulemaking provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (the “Act”), a major rule is a rule that the Administrator of the Office of Management and Budget’s Office of Information and Regulatory

Affairs (OIRA) finds has resulted or is likely to result in: 1) An annual effect on the economy of \$100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and foreign markets. The Department does not believe this rulemaking will meet these criteria.

Executive Orders 12372 and 13132.

This rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563.

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). The executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OIRA has not designated this rulemaking a “significant regulatory action” under section 3(f) of Executive Order 12866.

Executive Order 12988.

The Department of State has reviewed the rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175.

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act.

This rulemaking does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35;

however, the Department of State seeks public comment on any unforeseen potential for increased burden.

List of Subjects

22 CFR 120 and 125

Arms and munitions, Classified information, Exports.

22 CFR 126

Arms and munitions, Exports.

22 CFR 130

Arms and munitions, Campaign funds, Confidential business information, Exports, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth above, the interim final rule that was published at 81 FR 35611 on June 3, 2016, is adopted as a final rule with the following changes:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

2. Section 120.19 is amended by revising paragraph (a) introductory text to read as follows:

§ 120.19 Reexport.

(a) *Reexport*, except as set forth in § 126.16 or § 126.17, means:

* * * * *

3. Section 120.51 is revised to read as follows:

§ 120.51 Retransfer.

(a) *Retransfer*, except as set forth in § 126.16 or § 126.17, means:

(1) A change in end use or end user, or a temporary transfer to a third party, of a defense article within the same foreign country; or

(2) A release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place.

(b) [Reserved]

PART 125 – LICENSES FOR THE EXPORT OF TECHNICAL DATA AND CLASSIFIED DEFENSE ARTICLES

4. The authority citation for part 125 continues to read as follows:

Authority: Secs. 2 and 38, 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

5. Section 125.1 is amended by adding paragraph (f) to read as follows:

§ 125.1 Exports subject to this part.

* * * * *

(f) Unless limited by a condition set out in an agreement, the export, reexport, retransfer, or temporary import authorized by a license is for the item(s), end-use(s), and parties described in the agreement, license, and any letters of explanation. DDTC approves agreements and grants licenses in reliance on representations the applicant made in or submitted in connection with the agreement, letters of explanation, and other documents submitted.

PART 126 – GENERAL POLICIES AND PROVISIONS

6. The authority citation for part 126 continues to read as follows:

Authority: Secs. 2, 38, 40, 42, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108-375; Sec. 7089, Pub. L. 111-117; Pub. L. 111-266; Sections 7045 and 7046, Pub. L. 112-74; E.O. 13637, 78 FR 16129.

7. Section 126.16 is amended by revising paragraph (a)(1)(iii) to read as follows:

§ 126.16 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and Australia.

(a) * * *

(1) * * *

(iii) Reexport and retransfer. (A) Reexport means, for purposes of this section only, the movement of previously Exported Defense Articles by a member of the Australian Community from the Approved Community to a location outside the Territory of Australia.

(B) Retransfer means, for purposes of this section only, the movement of previously Exported Defense Articles by a member of the Australian Community from the Approved Community to a location within the Territory of Australia;

* * * * *

8. Section 126.17 is amended by revising paragraph (a)(1)(iii) to read as follows:

§ 126.17 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and United Kingdom.

(a) * * *

(1) * * *

(iii) Reexport and retransfer. (A) Reexport means, for purposes of this section only, movement of previously Exported Defense Articles by a member of the United Kingdom Community from the Approved Community to a location outside the Territory of the United Kingdom.

(B) Retransfer means, for purposes of this section only, the movement of previously Exported Defense Articles by a member of the United Kingdom Community from the Approved Community to a location within the Territory of the United Kingdom.

* * * * *

9. Section 126.18 is amended by revising paragraph (d)(1) to read as follows:

§ 126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.

* * * * *

(d) * * *

(1) Regular employees of the foreign business entity, foreign governmental entity, or international organization;

* * * * *

PART 130 – POLITICAL CONTRIBUTIONS, FEES AND COMMISSIONS

10. The authority citation for part 130 continues to read as follows:

Authority: Sec. 39, Pub. L. 94-329, 90 Stat. 767 (22 U.S.C. 2779); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

11. Section 130.2 is revised to read as follows:

§ 130.2 Applicant.

Applicant means any person who applies to the Directorate of Defense Trade Controls for any license or approval required under this subchapter for the export, reexport, or retransfer of defense articles or defense services valued in an amount of \$500,000 or more which are being sold commercially to or for the use of the armed forces of a foreign country or international organization. This term also includes a person to whom the required license or approval has been given.

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